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No. 03-1160

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

AZEL P. SMITH, *et al.*,

Petitioners,

v.

CITY OF JACKSON, MISSISSIPPI, *et al.*

Respondents.

On Writ of Certiorari To The
United States Court of Appeals
For the Fifth Circuit

BRIEF *AMICI CURIAE* OF AARP, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (AAUP), THE AMERICAN JEWISH CONGRESS, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND (AALDEF), MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND (MALDEF), MISSISSIPPI CENTER FOR JUSTICE (MCJ), NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), NATIONAL COUNCIL OF LA RAZA (NCLR), NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, NATIONAL SENIOR CITIZENS LAW CENTER AND THE NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF PETITIONERS

LAURIE A. MCCANN
Counsel of Record
DANIEL B. KOHRMAN
AARP FOUNDATION LITIGATION

MELVIN RADOWITZ
AARP
601 E Street, NW
Washington, DC 20049
(202) 434-2060
Counsel for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*[1]

AARP is a nonpartisan, nonprofit membership organization of more than 35 million people age 50 or older dedicated to addressing the needs and interests of older Americans. Approximately one half of AARP's members

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[1] The consents of the parties have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no party or entity other than *amici curiae*, their members, or counsel made a monetary contribution to the preparation or submission of this brief.

remain active in the work force, most of whom are protected by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-633. AARP supports the rights of older workers and the public policies designed to protect those rights and strives to preserve the legal means to enforce them. In this Court, AARP has participated as *amicus curiae* in, among others, the cases of *General Dynamics Land Sys. v. Cline*, 124 S.Ct. 1236 (2004); *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133 (2000); and *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998).

This brief is also submitted on behalf of the American Association of University Professors (AAUP), the American Jewish Congress (AJC), the Asian American Legal Defense and Education Fund (AALDEF), the Mexican American Legal Defense and Educational Fund (MALDEF), the Mississippi Center for Justice (MCJ), the National Association for the Advancement of Colored People (NAACP), the National Council of La Raza (NCLR), the National Partnership for Women and Families, the National Senior Citizens Law Center and the National Women's Law Center, all of which support the rights of older workers to be free from employment discrimination, whether on grounds of race, gender, national origin, religion, or age. The statements of interest of these *amici* are included in the appendix to this brief.

Amici urge the Court to reject suggestions that age discrimination in the work place is so fundamentally different from other forms of employment discrimination that Congress was convinced it could be adequately addressed by the disparate treatment theory alone. Holding that the ADEA encompasses both disparate treatment and disparate impact claims would be in complete harmony with the ADEA's congressional purpose as well as its legislative roots.

For these reasons, *amici curiae* respectfully submit this brief in support of the Petitioners.

SUMMARY OF ARGUMENT

In order to fully implement the will of Congress expressed in the ADEA, older workers must have the right to

pursue both disparate treatment and disparate impact claims. While the court below concluded that Congress limited ADEA claimants to the disparate treatment theory of proof, there is no persuasive evidence of such limits in either the ADEA's text, its legislative history, or its administrative history.

Denying the disparate impact method of proving age discrimination to its victims will thwart the intent of Congress by insulating from challenge discriminatory conduct that Congress has deemed devastating to individuals, society, and the national economy, and by undermining the core civil rights principle that workers should be judged based on their abilities rather than characteristics unrelated to their participation in the work force, such as age. Because the consequences of discrimination are devastating regardless of the employer's motivation or the protected status of the victim, older workers must be afforded the same rights and avenues for redress as those enjoyed by victims of other forms of employment discrimination.

Those courts that have restricted ADEA claimants to the disparate treatment theory of proof have attributed to Congress an intent to differentiate between ADEA claimants and Title VII claimants that is found nowhere in either statute. They have selectively misread the ADEA's legislative history, which, contrary to their conclusions, contains strong affirmative support for the disparate impact theory. And, they have failed to recognize how the function and purpose of the disparate impact theory, as articulated by this Court, is perfectly suited to policing what the Court has stated it considers to be the "essence" of age discrimination.

ARGUMENT

I. THE COURT HAS CONSTRUED LANGUAGE IN TITLE VII THAT IS VIRTUALLY IDENTICAL TO THAT IN THE ADEA AS THE SOURCE OF THE DISPARATE IMPACT THEORY.

Section (4)(a)(2) of the ADEA provides that "[i]t shall be unlawful for an employer . . . to limit, segregate, or classify his

employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2). This language is the mirror image of § 703(a)(2) of Title VII, 42 U.S.C. § 2000e(2)(a)." In *Griggs v. Duke Power Co.*, 401 U.S. 424, 426 n.1 (1971), the Court cited § 703(a)(2) as the statutory foundation for its decision that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation . . . ." 401 U.S. at 431. The Court has subsequently confirmed that the "adversely affect" language, that is identical to both Title VII and the ADEA, is the source of the disparate impact doctrine. *See Connecticut v. Teal*, 457 U.S. 440, 448 (1982).

In *Griggs*, the Court declared: "The objective of Congress in the enactment of Title VII *is plain from the language of the statute*." 401 U.S. at 429 (emphasis added). Accordingly, "[i]f the existence of the disparate impact approach is apparent from the 'plain' language of Title VII, it must also be apparent from the plain language of [the] ADEA." *EEOC v. Governor Mifflin Sch. Dist.*, 623 F. Supp. 734, 741 (D.C. Pa. 1985).[2/]

Since the ADEA and Title VII share common purposes and identical substantive provisions, they should be interpreted similarly. "The similarity in language [between § 623(a)(2) of the ADEA and § 703(a)(2) of Title VII] . . . is, of course, a strong indication that the two statutes should be interpreted *pari passu*." *Northcross v. Memphis Bd. of Educ.*, 412 U.S. 427, 428 (1973). *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *Greenwood Trust Co. v. Commonwealth of Mass.*, 971 F.2d 818, 827 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052 (1993) ("It is, after all, a general rule that when Congress borrows language from one statute and incorporates it into a

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[2/] As Petitioners correctly argue, current ADEA regulations, 29 C.F.R. § 1625.7(d) (2003), issued in 1981 pursuant to authority assigned to the EEOC, *see* 46 Fed. Reg. 47,724, 47,725 (Sept. 29, 1981); *see also infra.* n.14, provide for disparate impact claims based on this Court's ruling in *Griggs* and are entitled to deference.

second statute, the language of the two acts should be interpreted the same way."). The doctrine of *in pari materia* is especially appropriate for the ADEA and Title VII given that the substantive prohibitions of the ADEA "were derived *in haec verba* from Title VII." *Lorillard v. Pons*, 434 U.S. 575, 584 (1978).[3/]

The conclusion that identical language in the ADEA and Title VII was intended to prohibit the same forms of discrimination is bolstered by the fact that in addition to "shar[ing] common substantive features," the ADEA and Title VII share "a common purpose: 'the elimination of discrimination in the workplace.'" *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358 (1995) quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979). In *Northcross v. Memphis Bd. of Educ.*, 412 U.S. at 428, the Court reasoned that interpreting statutes with similar language *pari passu* is particularly appropriate when "the two provisions share a common *raison d'etre*." (citing *Johnson v. Combs*, 471 F.2d 84, 86 (5th Cir. 1972)).

[3/] One textual difference between the ADEA and Title VII that courts have relied on to deny the disparate impact theory to age discrimination victims is § 623(f)(1) of the ADEA. This provision permits employers to make decisions based upon "reasonable factors other than age." The provision is fully consonant with the disparate impact method of proving age discrimination and in fact, mirrors disparate impact analysis. *Amici* fully agree with the arguments in the *amici curiae* brief of the National Employment Lawyers Association's (NELA) and the Trial Lawyers for Public Justice that the RFOA provision supports a claim of disparate impact under the ADEA.

II. CONGRESS' INTENT TO REDRESS ALL FORMS OF "ARBITRARY" AGE BIAS, INCLUDING NEUTRAL POLICIES AND PRACTICES WITH A DISPARATE IMPACT ON OLDER WORKERS, IS SUPPORTED BY THE ADEA'S LEGISLATIVE HISTORY AND EARLY ENFORCEMENT HISTORY.

The legislative history of the ADEA powerfully supports the disparate impact theory of liability in ways that strongly reinforce textual proof that Congress intended to permit such a claim. The legislative record - like the ADEA itself - follows the precedent set by Title VII: it identifies entrenched, longstanding patterns of inequity and conceives powerful legal mechanisms to end unfair exclusion of a large and important group of workers from the U.S. labor force. Moreover, the ADEA's drafters anticipated specific workplace inequities that became the focus of disparate impact litigation under Title VII and the ADEA.

The ADEA's text and enactment record both reflect a certain attention to nuance, as befits a "follow-on" enactment, coming three years after the 1964 Civil Rights Act. Regrettably, some lower federal courts, plumbing the legislative record for guidance on the issue of disparate impact, have failed to show such sensitivity. Instead, they rely on either superficial or anachronistic reasoning, or both. They produce not greater clarity, but rather, a crude caricature of the ADEA's history. They suggest that the problems characterizing and the means needed to combat age discrimination, in contrast with bias banned by Title VII, are dramatically different: *i.e.*, nearly unrelated, rather than siblings or first cousins. Such a misguided reading of the historical record can only support an erroneous interpretation of the Act.

Both sides in the disparate impact debate have looked to the ADEA's legislative history, and in particular to a Report by

U.S. Labor Secretary W. Willard Wirtz,[4] on which Congress drew heavily in crafting the ADEA.[5]

However, after conducting no more than superficial analyses of the ADEA's legislative history, several appellate courts concluded that the Court effectively decided the disparate impact issue in *Hazen Paper v. Biggins*, 507 U.S. 604 (1993). *See, e.g., Adams*, 255 F.3d at 1326; *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1008-09 (10th Cir.), *cert. denied*, 517 U.S. 1245 (1996). But even the Fifth Circuit in this case recognized that *Hazen Paper's* analysis of legislative history was necessarily limited, because only a disparate treatment claim was before the Court. *See Smith*, 351 F.3d at 195 n.14. A fresh analysis by this Court is warranted. Its conclusions should be harmonized with the diverse and powerful evidence supporting disparate impact claims under the ADEA, including Congress' determination to outlaw all age discrimination shown to be "arbitrary," whether in its intent or its effects.[6]

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[4] U.S. Dep't of Labor, *The Older Worker: Age Discrimination in Employment, Report of the Secretary of Labor Under Section 715 of the Civil Rights Act of 1964* (1965) (hereinafter "WIRTZ REPORT" or "Report"). The Wirtz Report was compiled after Congress directed the Secretary to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and the consequences of such discrimination on the economy and individuals affected," in Section 715 of the 1964 Civil Rights Act. Pub. L. No. 88-352, 78 Stat. 241, 265 (1964).

[5] *Compare Smith v. City of Jackson*, 351 F.3d 183,193-95 (5th Cir. 2003) (majority opinion), with *id.* at 201-03 (Stewart, J., dissenting in part); *compare Adams v. Florida Power Corp.*, 255 F.3d 1322, 1325 (11th Cir. 2001) (majority opinion), *cert. dismissed*, 535 U.S. 1054 (2002), with *id.* at 1330-31 (Barkett, J., concurring).

[6] While this Court conducted an extensive and thoughtful review of the ADEA's legislative history in *General Dynamics Land Sys., Inc. v. Cline*, 124 S. Ct. 1236 (2004), it did not squarely address the scope of "arbitrary discrimination" identified in the Wirtz Report or subsequently.

A. The ADEA's History Demonstrates Congress' Intent to Ban All "Arbitrary" Age Discrimination, Including Age-Neutral Policies and Practices that Fall More Harshly on Older Workers and Do Not Meet Genuine Employer Needs.

The Wirtz Report, the principal document establishing Congress' purpose in enacting the ADEA,[7] clearly recognized as "arbitrary," and thus needing remediation through civil rights legislation, facially neutral policies and practices falling more harshly on older workers that are devoid of any substantive business or other policy justification. Thus, without using the phrase "disparate impact," Secretary Wirtz unmistakably condemned, and paved the way for the ADEA to proscribe, employer practices of the identical sort the Court held unlawful under Title VII in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

The ADEA's focus on banning "arbitrary" discrimination anticipated *Griggs*' identification of "disparate impact" as a method for the "removal of artificial, *arbitrary*, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." 401 U.S. at 431 (emphasis added). Indeed, the Wirtz Report specifically described as arbitrary, and thus

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[7] The Wirtz Report's "findings were confirmed throughout the extensive factfinding undertaken by the Executive Branch and Congress." *EEOC v. Wyoming*, 460 U.S. 226, 230-31 (1983). Congress directed the Secretary "to submit specific legislative proposals for prohibiting age discrimination"; these were endorsed by President Johnson and culminated in the 1967 law enacted by Congress. *Id.* at 230-32. For instance, the ADEA's preamble, 29 U.S.C. § 621(a), summarizes findings in the Wirtz Report on "individual and social costs of age discrimination." *EEOC v. Wyoming*, at 231. Likewise, the ADEA's text paraphrases strategies endorsed in the Report: "to promote employment of older persons based on their ability rather than age; to prohibit *arbitrary* age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b) (emphasis added).

targeted for regulation by civil rights law, various concrete practices later challenged in *Griggs*. *See infra* at 10-14.

The ADEA concept of "arbitrary discrimination" originated with Congress' directive to the Secretary requiring a report on age bias: "containing the results of such study" and including "such recommendations for legislation to prevent *arbitrary discrimination* in employment because of age as he determines advisable." WIRTZ REPORT at 1 (emphasis added). The following year, the Wirtz Report reaffirmed this approach, identifying "arbitrary discrimination" as the "kind [of bias] which might be dealt with by a statute prohibiting discrimination in employment on the basis of age." *Id.* at 18.

Although the Secretary's non-legal analysis naturally omitted proposed terminology for the conduct Congress should legally proscribe, the Wirtz Report does contain valuable clues to the scope of the terms Congress enshrined in the ADEA. For example, in the "Introduction," the Secretary described "arbitrary discrimination" against older workers as employer misconduct "most closely related" to employment discrimination banned by the 1964 Civil Rights Act. *Id.* at 2. To the extent Title VII of that Act has come to forbid disparate impact discrimination, it follows that the Secretary's formulation favors interpolation of the same force and effect into the ADEA. Further, the Wirtz Report declared that "arbitrary discrimination" consisted of the "non-employment" or "rejection" of older workers "because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions*." *Id.* (emphasis in original). This broad and fluid category of employer misconduct, often based on misguided stereotypes, is consistent with unlawful age discrimination encompassing the disparate impact theory of proof, and inconsistent with Respondents' proposed definition of illegal age bias as limited to overt and purposeful bias.

1. The Wirtz Report Identified Neutral Employment Standards as a Form of Arbitrary Discrimination.

Notwithstanding the clarity of the Introduction to the Report, the Fifth Circuit fixated on select portions of the remainder of the Report, to the wholesale exclusion of others that reaffirm the thrust of the preamble. *See* 351 F.3d at 194 n.13. To be sure, the Report discussed findings of a special study of express - *i.e.*, intentional - age limits in employment.[8/] And these age maximums are portrayed as "persistent and widespread" and "the most obvious kind of age discrimination in employment." WIRTZ REPORT at 6, 20. But none of these adjectives - and no other statement in the Report - identifies express age limits as the "sole" or "exclusive" form of bias that should be illegal. Indeed, the formulation "most obvious" flatly contradicts such a reading. *See* 351 F.3d at 194 n.13 (noting explicit age restrictions are the "*most dominant* form of arbitrary discrimination discussed in the Report") (emphasis added).

Moreover, the Report elsewhere condemned employer conduct with the same result - lesser opportunity for older workers - but involving unintentional discrimination. In particular, following a discussion of "specific age limitations, indiscriminately applied," WIRTZ REPORT at 11, the Secretary went on to discuss a separate category of employer "decisions made about aging and ability to perform in individual cases [in which] *there may* or may not *be arbitrary discrimination*." *Id.* at 5 (emphasis added). Wirtz considered this category of possible "arbitrary" bias ("The Necessary Force of Circumstance") to be "equally important" to understand as explicit age limits, because "the force of certain circumstances . . . unquestionably affect older workers more strongly, as a group, than they do younger workers." *Id.* at 11. Thus, the meaning of § 2(b) of the ADEA, 29 U.S.C. § 621(b), which broadly dedicates the Act "to prohibit arbitrary age discrimination," is not limited by § 2(a)(2), 29

8/ The study looked at 500 firms in five cities in those states without age bias statutes in order to assess "employer policies of not hiring people over a certain age, without consideration of a particular applicant's individual qualifications." WIRTZ REPORT at 6.

U.S.C. § 621(a)(2), simply because the latter includes the "most obvious" form of harm to older workers - "arbitrary age limits" - in a list of the problems to be addressed by the Act.

Were these "circumstances" unrelated to policies that courts now permit workers to challenge via disparate impact theory, such parsing of the Wirtz Report to persuade the Court to adopt a broad definition of "arbitrary" discrimination would be no more persuasive than Respondents' efforts to confine that term to a bare minimum. But repeatedly this section of the Report discusses factors associated with age bias of the sort that might, "depending on the individual circumstances," WIRTZ REPORT at 5, give rise to a viable "disparate impact" suit.

Secretary Wirtz cited four "Forces of Circumstance" that lead employers to adopt new job requirements difficult for older workers to meet; in some instances, he observed, such criteria may be unrelated to actual job needs. *Id.* at 11-15. This concisely summarizes the core facts supporting a *prima facie* case of disparate impact employment discrimination. Remarkably, the Report also went on to describe as unjust both job criteria held unlawful six years later in *Griggs* on a theory of disparate impact.

First, Wirtz criticized a high school graduation requirement for new employees, unjustified in terms of applicants' ability to do the job, and falling more harshly on members of a protected group, some of whom were qualified by virtue of experience, but few of whom graduated high school. WIRTZ REPORT at 3.[9/] *See Griggs*, 401 U.S. at 430-31 and n.6 (high school graduation required for all jobs other than laborers). The logic of Wirtz' concern is clear: in a U.S. labor market where educational attainment was (and still is) growing rapidly among younger workers, older workers consistently will fall short. The Report therefore implies, consistent with support for a disparate impact theory of liability, that "[a]ny employment

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9/ *See Id.* at 11-13 (noting, *inter alia*, that "[e]ven for many plant production jobs in the major industries, employers for a variety of reasons seek young workers with high school educations or equivalent vocational training"). The *Griggs* plaintiffs were power plant workers. 401 U.S. at 426.

standard" based on educational attainment "will obviously work against the employment of many workers – unfairly if, despite his limited schooling, an older worker's years of experience have given him the relevant equivalent [qualifications]." WIRTZ REPORT at 3.

Second, Wirtz objected to requirements that job applicants "pass a variety of aptitude and other entrance tests." *Id.* at 14. *See Griggs*, 401 U.S. at 427-28, 430-31 and n.6 (discussing aptitude tests used by the Company, their lack of a "demonstrable relationship" to job performance, and grossly disparate pass rates for both, favoring whites). Specifically, Wirtz noted that younger workers' "recency of education and testing experience," rather than any strong connection between test results and "average performance" or "steadiness of output," explained younger applicants' greater success in securing such jobs. WIRTZ REPORT at 14-15. Wirtz reasoned that some jobs require workers with "better" or more "recent" education, but others do not. For instance, "average performance of older workers compares most favorably in office jobs, where productivity ... rose with age." *Id.* at 14.[10]

Wirtz' clear-sightedness, six years before *Griggs*, is stunning. He, like the *Griggs* Court, criticized "not only overt discrimination but also practices that are fair in form, but

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[10] Were Wirtz writing today, he might expand considerably his passage on the arbitrary adverse impact on older workers of pre-employment testing. Since the mid-1960's, the testing industry has grown considerably in size and influence. *See generally* Nicholas Lehman, THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY (Farrar Straus & Giroux 1999). *See also* Brenda Paik Sunoo, "Weighing the Pros and Cons of Pre-employment Testing," WORKFORCE, March 1997, at 125 ("Every professional human resource position I've held during the last 20 years has utilized pre-employment testing to help narrow large applicant pools and differentiate between levels of knowledge and skills among candidates."). Without a disparate impact theory of liability, it is virtually impossible to challenge a workplace test on age discrimination grounds. *See* 29 C.F.R. §1625.7(d) (2003) ("Tests which are asserted as 'reasonable factors other than age' will be scrutinized [by EEOC] with the standards set forth in Part 1607 of this title.").

discriminatory in operation." *Griggs*, 401 U.S. at 431. And his rationale was nearly identical: "[i]f an employment practice which operates to exclude . . . cannot be shown to be related to job performance," it is improper. *Id.* Wirtz' prescience should not be casually dismissed as coincidence.

Wirtz was especially concerned about older workers' problems due to rapid advances in technology. WIRTZ REPORT at 11, 13-14. These too, he concluded, tended to generate employment criteria likely to disadvantage older workers. Although the Secretary seemed to view such trends as more likely posing difficulty for older workers meeting legitimate job qualifications, he also identified reasons to believe that these forces could produce unwarranted stereotypical thinking. Thus, although older workers might become "entrenched in areas from which jobs have disappeared," *id.* at 13, by contrast, in what we might now describe as "high tech" areas, a "young work force might then come to be regarded as a 'normal' work force, and the hiring of older workers as 'exceptional.'" *Id.* at 14.

Even if Secretary Wirtz did not identify by name the "disparate impact" method of proof in 1965 that this Court recognized as a means to combat "arbitrary discrimination" in 1971, his Report clearly acknowledged that age-neutral job criteria could produce "arbitrary discrimination" against older workers even though such criteria might be founded simply on faith in "'progress,'" *id.* at 3, rather than age-based animus. By describing such age-neutral bias as "arbitrary," the Report clearly supported it being prohibited by what became the ADEA.

The Wirtz Report also cited evidence of "arbitrary discrimination" in still other types of employment policies and practices involving unintentional bias against older workers. With regard to "Institutional Arrangements that Indirectly Restrict the Employment of Older Workers," Wirtz stated that "[t]he practice of generalizing personnel hiring policy by arbitrary rules which ignore individual differences is itself a factor that deprives companies of talent and qualified workers of opportunity." *Id.* at 15. Similarly, the Report observed with regard to employer benefit plans that:

> The extent to which the range of pension plan-induced limitations on employment can be considered to constitute arbitrary discrimination is not a simple matter, particularly in the light of the great variations in plan provisions and employer practice. Case-by-case examination is necessary to separate reasonable from unreasonable practice.

Id. at 17.

2. Regulations and Advisory Opinions Reaffirm That Age-Neutral, Non-Job-Related Policies and Practices With Adverse Impacts on Older Workers Violate the ADEA.

Following the ADEA's enactment, the Secretary of Labor supervised issuance of two sets of materials highly relevant to interpretation of the new law. Both strongly reaffirmed language in the Report to the effect that the ADEA was intended to ban age-neutral, non-job-related, employment practices with adverse disparate impact on older workers. First, the Department of Labor (DOL) promulgated interpretive regulations, *see* 29 C.F.R. Part 860 (1968), within days after the ADEA went into effect. Second, in the ensuing months, the Department began issuing interpretive opinion letters.

DOL regulations required, *inter alia,* with regard to physical requirements: (a) that age-neutral fitness standards be "reasonably necessary for the specific work to be performed"; (b) that a "differentiation based on a physical examination, but not one based on age" was "reasonable" only for positions which "necessitate" stringent physical requirements; and (c) that pre-employment physical examinations distinguish between the physical demands of various jobs.[11/] In addition, the regulations

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[11/] These provisions, 29 CFR § 860.103(f)(1)-(2), "were entirely consistent with Secretary Wirtz's findings three years earlier that physical requirements (continued...)

provided that age-neutral employment evaluation criteria like quantity of output, quality of production, or educational level had to have "a valid relationship to job requirements." 29 C.F.R. § 860.103(f)(1)-(2).[12/]

The regulations also clarified an important aspect of the Wirtz Report. In the Secretary's discussion of express age limits, he noted that

> [a] significant proportion . . . are arbitrary in the sense that they have been established without any determination of their actual relevance to job requirements, and are defended on grounds apparently different from their actual explanation.

WIRTZ REPORT at 7. The Report enumerated nine such employer "defenses" of age limits, eight of which (other than "Desired age balance in the work force") have no direct connection to age. *Id.* at 8. Thus, the regulations confirm, as suggested in the Report, that even after the ADEA's enactment, most age limits made unlawful by the Act could be defended on age-neutral grounds,

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[11/](...continued)
(i.e., strength, speed, dexterity, quantity of work) were employers' most frequently mentioned consideration for restrictions on the hiring of older workers, but that many of these requirements had 'no studied basis.'" Keith R. Fentonmiller, "Continuing Validity of Disparate Impact Analysis for Federal Sector Age Discrimination Claims,"47 AM. U. L. REV. 1071, 1104 and nn. 195, 196 (1998) (quoting WIRTZ REPORT at 8, and referring to the Secretary's Research Materials at 4, 11-12). The Secretary submitted the "Research Materials" to Congress in June 1965 along with and in support of the Report. *See* WIRTZ REPORT at ii.

[12/] In this respect, the regulations also "echoed the Secretary's prior criticism of unfair educational requirements that 'penalize' the older worker [and] his finding that written tests with 'little direct relationship to the jobs' tended to preclude the employment of otherwise qualified older applicants." Fentonmiller, 47 AM. U. L. REV. at 1104-05 and nn. 198-200 (citing Research Materials at 81 and at 14, and WIRTZ REPORT at 3).

thus raising the issue how to assure that the "arbitrary discrimination" many of them represented could be challenged. The regulations did *not* answer this question by directing attention to the intentional discrimination such neutral rules might mask, consistent with the later-developed "disparate treatment" method of proof. Rather, the regulations set out guidelines for identifying which neutral rules with adverse impact on older workers are justified by employer needs, consistent with the later-developed "disparate impact" theory of proof.[13/]

The EEOC's current ADEA regulations are to the same effect, as Judge Barkett recognized in her *Adams* concurrence. That is, they recognize that the "reasonable factors other than age" defense "works in tandem with the business necessity defense in the disparate impact analysis." 255 F.3d at 1328.[14/]

Also in 1968, Secretary Wirtz's Department of Labor issued several advisory opinions regarding ADEA implementation confirming the view that age-neutral employer practices were subject to the Act. These declared, *inter alia*, that "'facially-neutral job requirements and employment practices, such as testing, must be validated and job-related.'" Fentonmiller, at 1104 and n.204 (citing Charles T. Lindquist, Administrator, Wage and Hour and Public Contracts Divisions, U.S. Dep't of Labor, ADEA Opinion Letter (August 1, 1968)

[13/] The same can be said of the regulations as revised in early 1969 to clarify, for example, that even a validated employee test had to be "specifically related to the requirements of the job," as well as "fair and reasonable." 29 C.F.R. § 860.104(b) (1969).

[14/] Congress reassigned responsibility for administering the ADEA from the Department of Labor to the EEOC in 1979. *See* Reorg. Plan No. 1 of 1978, 92 Stat. 3781, 43 Fed. Reg. 19807 (May 9, 1979). Current regulations require that employment practices with an adverse impact on individuals 40 and over that are defended as based on [reasonable] factors other than age "can only be justified as a business necessity." 29 C.F.R. § 1625.7(d) (2003). And if an employment test has such adverse impact, it must be validated according to the Uniform Guidelines on Employee Selection Procedures *See id.* § 1607 (2003).

and Ben P. Robertson, Deputy Administrator, Wage and Hour and Public Contracts Divisions, U.S. Dep't. of Labor, ADEA Opinion Letter (October 9, 1968)).

Wirtz consistently urged that the ADEA be interpreted broadly, in order to root out unfair and arbitrary treatment of older workers. The Secretary testified in 1967 that the purpose of the proposed ADEA was "to get away from arbitrary age distinctions and go to judgment of individuals on their merits"; he wondered "whether we should strike any reference to age at all in any connection and look at employment only in terms of whether the individual does have or does not have the capacity to do whatever job it is that individual is seeking."[15/] In the 1965 Report, at the outset of his "Conclusions and Recommendations," Wirtz declared:

> It would be the worst misfortune if the problem of age discrimination in employment, having come to the Congress' attention, were posed so narrowly as to result in superficial prescription.

WIRTZ REPORT at 21. In 1976 Congressional hearing testimony, former Secretary Wirtz lamented the lack of progress in eliminating barriers to age bias in the workplace and concluded: "there is more reason now, not less, for rigorous enforcement of the ADEA."[16/] Yet, that would be the precise result if the Fifth Circuit's ruling is affirmed.

[15/] *Age Discrimination in Employment, 1967: Hearings on S. 830 & S. 788 Before the Subcomm. On Labor of the Senate Comm. On Labor and Pub. Welfare*, 90th Cong. 51-52 (1967). Secretary Wirtz also asserted that the labor market was "putting more and more people with more and more competence and capacity out to pasture earlier and earlier."

[16/] *Impact of the Age Discrimination in Employment Act of 1967, Before the Subcomm. on Retirement Income and Employment, House Select Comm. on Aging*, 94th Cong. 2d Sess. 81 (1976).

B. The Fifth Circuit Erred in Concluding that the Legislative History of the ADEA Precludes Reliance on the Disparate Impact Approach to Proving Age Discrimination

As in *Adams v. Florida Power Corp.*, the Court confronts a federal appellate decision juxtaposing an overly confident assessment of the ADEA's legislative history with scant evidence of attention to the task. The Fifth Circuit reached two unfounded conclusions related to legislative history. First, the court opined that the Wirtz Report defined "arbitrary discrimination," as consisting solely of "explicit age limitations," *i.e.*, "a form of disparate treatment." *Smith*, 351 F.3d at 193-94 and n.13. Second, the court stated that ADEA's history differs materially from that of Title VII, in that it reflects a narrowly "refined purpose" in contrast with "the broad remedial purpose" that animates Title VII. *Id.* at 194.

The *Smith* court ignored a diversity of practices that the Wirtz Report condemned as "arbitrary." *See supra* at 10-14. Indeed, the Report mapped out a more complex taxonomy of age discrimination, in which some "arbitrary" age bias is explicit, but some is founded on actions of an "unthinking majority," WIRTZ REPORT at 3, and still more is premised on unjustifiable – but age-neutral – reliance on tests, physical and educational criteria and other factors unrelated to a worker's productivity or ability to do the job in question. Unaccountably, the court below appears to have simply bypassed many key passages of the Report.[17/] Thus, it was clear error to conclude that the Report equated "arbitrary discrimination" only with "explicit age limitations." 351 F. 3d at 194.

[17/] The decisions in *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir. 1999) and *Mullin v. Raytheon Co.*, 164 F.3d 696 (1st Cir.) *cert. denied*, 528 U.S. 811 (1999), suffer from the same analytical flaw. At page 6 of the Wirtz Report, a topic heading superficially associates "Arbitrary Discrimination [and] Specific Age Limits"; but as noted above, on pages 2, 5 and 6, the Report clearly embraces a much broader meaning of the term.

The court compounded its errors assessing the nature of "arbitrary discrimination" by drawing extreme and unwarranted conclusions from the Wirtz Report's discussion of the nature and origins of race discrimination. The Fifth Circuit correctly notes the Secretary's efforts to address the lack of invidious "prejudices in American life which apply to older persons." WIRTZ REPORT at 6. But the court simply assumes its own conclusion in reasoning the "mischief in the Report is ... more accurately targeted by a disparate treatment theory, not a disparate impact theory." 351 F.3d at 194. What is the basis for "more accurate[] target[ing]" if not an implicit presumption in favor of minimizing the scope of the ADEA? Certainly there is nothing in the Report itself to support the goal of "more accurate[] target[ing]." Nor is there anything in the Report to suggest arbitrary age bias is acceptable or deserving less than vigorous assault because it is less often animated by hate.

Moreover, the "targeting" thesis seems exactly wrong. If relatively more age bias than race bias is animated by subconscious stereotypes, rather than overt animus, and relatively more age bias than race bias has to be assessed for arbitrariness "depending on the individual circumstances," WIRTZ REPORT at 5, it follows that the disparate impact method of proof may be more central to an effective ADEA than to an effective Title VII. At a minimum, it follows that Congress intended at least as many and as powerful remedial tools to be included in the ADEA as in Title VII.

Nor is it clear why the Secretary's analysis could imply victims of age bias deserve any less relief than race bias victims. Surely it is true that the Secretary favored a more nuanced analysis in determining whether facially neutral policies mask irrational, discriminatory age bias than comparable bias based on race. But assuming such bias can be found, why sanction the one and not the other? Nothing in the Report suggests the Secretary intended such a result.

In embracing a narrow construction of the ADEA, the court also asserted that "[t]he cornerstone of *Griggs'* holding that disparate impact is cognizable under Title VII is ... the link between the history of educational discrimination on the basis of

race and the use of that discrimination to continue to disadvantage individuals on the basis of their race." 351 F.3d at 195. Once again the Fifth Circuit reached this neat formulation only by ignoring a great deal of the relevant landscape. For instance, the court failed utterly to explain how Title VII sex (or religion or national origin) disparate impact claims may be justified based on a rationale drawn exclusively from the history of race bias in America. Plainly, it cannot. Further, the court's rationale omits a justification for disparate impact race cases on behalf of whites or males. Finally, the court makes no mention of Secretary Wirtz's findings that older workers face their own "built-in headwinds" in the workplace. These persistent barriers – *e.g.*, an ever more outdated educational background; an ever more outdated test-taking capacity; an ever growing perception that certain assignments and jobs and even industries have passed you by – are surely different and less scurrilous in their origins than those faced by members of minority groups, especially African-Americans, but they are daunting nevertheless.[18/]

III. DISPARATE IMPACT IS AN ESSENTIAL COMPLEMENT TO DISPARATE TREATMENT IN POLICING WHAT THE COURT CONSIDERS TO BE THE "ESSENCE" OF AGE DISCRIMINATION.

In *Watson v. Fort Worth Bank & Trust*, a plurality of the Court noted that the disparate impact theory of proof is necessary to "adequately police[]. . . the problem of subconscious

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[18/] The court also ignored Secretary Wirtz's review of the history of explicit age limits, and the possibility that these established patterns of stereotypical thinking about older workers persist to this day. WIRTZ REPORT at 9-10; *see EEOC v. Wyoming*, 460 U.S. at (noting, *inter alia*, that in 1903, Colorado became the first state to adopt an age discrimination law applicable to employment).

stereotypes and prejudices." 487 U.S. 977, 990 (1988).[19/] Given that the Court has also stated that the "essence of age discrimination" is older workers being harmed by "inaccurate and stigmatizing stereotypes," *Hazen Paper Co.*, 507 U.S. at 610,[20/] the disparate impact theory must be available to attack the serious problem of age discrimination in the work place.[21/]

However, in the wake of the Court's comment in *Hazen Paper* that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA," *id.*, language which was not central to the decision, several courts wrongly inferred that "the ADEA only prohibits intentional discrimination." *See, e.g., Ellis*, 73 F.3d at 1008; *Mullin*, 164 F.3d at 701; *Adams*, 255 F.3d at 1326. These courts erred in taking such a giant leap from an observation about the nature of age discrimination.

[19/] *See also Alexander v. Choate*, 469 U.S. 287, 292-99 (1985) (discussing the *appropriateness* of disparate impact analysis under § 504 of the Rehabilitation Act since discrimination against the handicapped often results from thoughtlessness not animus).

[20/] In *EEOC v. Wyoming*, the Court also recognized, as the Wirtz Report explained, that irrational judgments based on age stereotypes were "often defended on grounds different from [their] actual causes." 460 U.S. at 231; *see* WIRTZ REPORT at 7. The Report elaborated that explicit age limits often were defended on age-neutral grounds, which non-age-based rationales were "undoubtedly believed to be in many cases" the true explanations of age limits. *Id.*

[21/] Judge Cudahy recognized this seemingly obvious contradiction in his dissent from *EEOC v. Francis W. Parker School*: "[T]he disparate impact theory of liability is designed as a means to *detect* employment decisions that reflect 'inaccurate and stigmatizing stereotypes,' . . . This is precisely the determination that *Hazen Paper* says the ADEA is intended to outlaw." 41 F.3d 1073, 1080-81 (7th Cir. 1994), *cert. denied*, 515 U.S. 1142 (1995) (emphasis in original). *See also* Steven J. Kamenshine, "The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act, 42 FLA. L. REV. 229, 309 (1990) ("[T]he assertion that age discrimination results from unconscious stereotyping arguably cuts in favor of, not against, the application of disparate impact in age cases.").

First, while there can be no question that *one* of the reasons Congress enacted the ADEA was to combat discrimination based on "stereotypes unsupported by objective fact," *EEOC v. Wyoming*, 460 U.S. at 231, there is no basis in either the ADEA's language or the legislative history to restrict its reach to employment decisions based on stereotypes.[22/] Surely it was not the intent of this Court in *Hazen Paper* to thwart the will of Congress by grafting an additional criterion of proof onto the ADEA, severely curtailing the Act's broad protections.

A. Stereotyping Is Often Unintentional.

Since actions based on stereotypes are not necessarily intentional,[23/] it is erroneous to conclude that because inaccurate stereotypes are often behind age discrimination the ADEA only

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[22/] Taken at face value, this Court's comments are corroborated in the legislative record of the ADEA, which featured prominently the seemingly nationwide phenomenon of "persistent and widespread use of age limits in hiring." WIRTZ REPORT at 21. Yet the very same can be said of Congress' proceedings in enacting Title VII. That is, "facially-race discriminatory employment practices [were] the primary impetus behind the passage of Title VII in 1964," yet "[o]bviously disparate treatment does not define the limit of Title VII's reach, even though it may 'capture the essence' of Title VII's prohibitions." Fentonmiller, at 1112; *see* Kamenshine, 42 FLA. L. REV. at 291("in the same way Congress was preoccupied with overt racial policies when it outlawed race discrimination under Title VII"). It follows that Congress' and Secretary Wirtz's attention to "overt age restrictions as the most glaring age-based obstacles," *id.*, do not limit the reach of the ADEA.

[23/] The argument that disparate impact is inappropriate where discrimination is caused by stereotypes, not animus, "jeopardize[s] the availability of disparate impact in gender cases as well because gender discrimination, like age, is based more on paternalistic stereotypes than on malevolence." Kaminshine, 42 FLA. L. REV. at 310 (footnote omitted). For that matter, while "race discrimination is steeped in a history of unparalleled hatred and bigotry . . . race discrimination today is often based on the same kind of stereotypes and group-based assumptions about ability that form the basis of age discrimination." *Id.*

prohibits intentional discrimination. Actions based on stereotypes can be, and often are, unintentional, and the disparate impact theory is particularly well-suited to detecting discrimination caused by unintentional stereotyping. After all, the premise of the disparate impact theory is that "not all discrimination is apparent and overt. It is sometimes subtle and hidden. It is at times hidden even from the decisionmaker herself, reflecting perhaps subconscious predilections and stereotypes." *EEOC v. Francis W. Parker Sch.*, 41 F.3d at 1080 (J. Cudahy, dissenting). This is especially true of age discrimination. Using the disparate impact theory to ferret out stereotypes based on age is consistent with the research on the nature and causes of ageism.[24/]

> Age distinctions are particularly unique because they so often are used thoughtlessly rather than as intentional expressions of invidious malice or even mildly bigoted intent . . . Because of this relatively innocuous nature of ageism, the likelihood is considerable that employers may adopt facially neutral policies without recognizing or caring that these policies may have a disparate impact upon older workers.

Howard Eglit, "The Age Discrimination in Employment Act's Forgotten Affirmative Defense," 66 BOSTON LAW REV. 155, 222 (1986). *See also* Becca R. Levy & Mahzarin R. Banaji, *Implicit Ageism*, in AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS 49, 50 (Todd D. Nelson ed., 2002) ("[o]ne of the most insidious aspects of ageism is that it can operate without conscious awareness, control, or *intention to harm*.") (emphasis added).

[24/] The term "ageism" was coined by Robert N. Butler, M.D. to describe the "deep and profound prejudice against the elderly which is found to some degree in all of us." Robert N. Butler, WHY SURVIVE?: BEING OLD IN AMERICA 11 (1975). Butler describes ageism as "a process of systematic stereotyping of and discrimination against people because they are old, just as racism and sexism accomplish this with skin color and gender . . . ." *Id.* at 12.

Recent research has focused on this unconscious age discrimination, also called "implicit ageism" which "is defined as the thoughts, feelings, and behaviors toward elderly people that exist and operate without conscious awareness or control, with the assumption that it forms the basis of most interactions with older individuals." Becca R. Levy, "Eradication of Ageism Requires Addressing the Enemy Within, 41 THE GERONTOLOGIST 578, 578 (Oct. 2001). In a related study, the authors explained:

> Age-related biases . . . may have become so routinized that they may influence social judgments at a level below that at which we consciously ascribe traits to others. Such 'automatic' ageism may be hard to eradicate if it has been incorporated into our implicit personality theories or social schemata and is evoked without awareness on our part.

Charles W. Perdue & Michael B. Gurtman, "Evidence for the Automaticity of Ageism," 26 JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY 199, 201 (1990). Unconscious ageism is pervasive in our society. "Ageism permeates our culture so thoroughly and conditions our attitudes and perceptions so much that most of us are unaware of most of the ageism in it." Erdman B. Palmore, AGEISM: NEGATIVE AND POSITIVE 98 (2d ed. 1999).

Unconscious discrimination is not unique to age discrimination. Like ageism, "[r]acism is in large part a product of the unconscious. It is a set of beliefs whereby we irrationally attach significance to something called race. . . ." Charles R. Lawrence, III, "The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism," 33 STAN. L. REV. 317, 330 (1987).[25] However, "[a] survey of implicit ageism found that 95% of the participants had negative views of old people . . . a higher proportion than for implicit racism or sexism." Levy, at 578. *See also* Levy & Mahzarin, at 54-55 (discussing research

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[25] *See* Deborah L. Rhode, "The 'No-Problem' Problem: Feminist Challenges and Cultural Change," 100 YALE L.J. 1731, 1764-68 (1991), for a discussion of studies establishing unconscious sexism.

that showed that anti-age attitude is "among the largest negative implicit attitudes ... observed. . . . .").

B. Disparate Impact is a Very Effective Tool for Policing Discrimination Based on Stereotypes.

It is well established in Title VII jurisprudence that disparate impact is a valuable tool in ferreting out subtle forms of discrimination. *See, e.g., In re: Employment Discrimination Litigation Against the State of Alabama*, 198 F.3d 1305, 1321 (11th Cir. 1999) ("a genuine finding of disparate impact can be highly probative of the employer's motive since a racial 'imbalance is often a telltale sign of purposeful discrimination.'") (quoting *International Board of Teamsters v. United States*, 431 U.S. 324, 339-40 n.20 (1977)). Indeed, this Court recognizes that disparate impact may serve as an effective method of identifying intentional bias that is well hidden. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. at 987 ("[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination."); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (employer refusal to follow alternative workplace practice with lesser discriminatory impact is evidence that the challenged practice was merely a "pretext" for discrimination); *Connecticut v. Teal*, 457 U.S. 440, 447 (1982) (same).[26]

The fact that "age discrimination is characterized more by indifference and thoughtless bias than by overt hostility . . . makes detection of unlawful motive impractical and enhances the risk of evasion." Kamenshine, at 318. "If individuals are not aware that a negative stereotype of age has been automatically triggered by a person's older age, they are likely to attribute their behaviors (*e.g.*, failure to hire. . .), to another factor that better

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[26] *See also EEOC v. Francis W. Parker Sch.*, 41 F.3d at 1078 ("Moreover, disparate impact theory does not relieve the EEOC of its obligation to prove the error of the employer's ways. ... Ultimately, the EEOC must show that Parker's rationale is pretextual and ... is predicated on some stereotype, conscious or *unconscious*") (emphasis added).

fits their preferred self-images as reasonably fair individuals. Thus, rather than acknowledge that 'I hired a younger person in preference to an older person,' a rationalization, such as the older applicant's personality or training, might be evoked." Levy, at 578. *See also* Perdue, & Gurtman, at 200 ("characterizing the aged as unemployable, unintelligent, and 'naturally' unhealthy may help to rationalize discriminatory practices in employment . . . ."). As one commentator observed with regard to the same phenomenon in the context of race discrimination:

> When racism operates at a conscious level, opposing forces can attempt to prevail upon the rationality and moral sensibility of racism's proponents . . . . But when the discriminator is not aware of his prejudice . . . neither reason nor moral persuasion is likely to succeed. The process defect is all the more intractable, and judicial scrutiny becomes imperative.

Lawrence, 39 STAN. L. REV. at 349. Disparate impact is just as crucial to combating age discrimination as it is to challenging prejudice based on race, national origin, or sex. "People are more conscious of these latter biases but often are unaware of their age bias. Age stereotypes persist because people tend not to examine the basis for these stereotypes and also give disproportionate weight to any data they believe tend to support them." Raymond F. Gregory, AGE DISCRIMINATION IN THE AMERICAN WORKPLACE: OLD AT A YOUNG AGE 26-27 (2001).

Those circuits that have precluded the application of disparate impact to ADEA cases "seem to assume that only barriers based on animus create problems. But one can have a 'status quo' based on inaccurate stereotypes that society needs to destroy as much as one can have 'status quo' based on animus that should be swept away." Roberta Sue Alexander, "Comment: The Future of Disparate Impact Analysis for Age Discrimination in a Post-Hazen World," 25 DAYTON L. REV. 75, 94 (1999).

If ADEA claims can be established only through disparate treatment analysis, it will be far more difficult to address the issue of unconscious prejudice and the "essence" of

age discrimination will be effectively insulated from challenge. Indeed, if as this Court suggested age discrimination is most often caused by stereotypes, then "a theory that tests only for intentional discrimination necessarily misses its mark much of the time." David Benjamin Oppenheimer, "Negligent Discrimination," 141 U. PENN L. REV. 899, 903-04 (1993). The end result is a "status quo" of age bias based on unconscious stereotyping. Indeed, research on age stereotyping suggests that we have already reached such a "status quo." Such research demonstrates that most individuals harbor specific beliefs about older people, that most of those beliefs are inaccurate, and that the stereotypes have persisted in disadvantaging older persons for decades.[27] For example, research on age stereotyping in employment has consistently found that older employees are almost always treated and rated less favorably than younger employees.[28]

The Fifth Circuit's conclusion that the ADEA lacks the "historical and remedial concerns that, in the Title VII context, led to the recognition of disparate impact claims directed at overcoming the consequences of past societal discrimination," 351 F.3d at 195, is a flawed basis for discarding disparate impact theory under the ADEA. As this Court itself has recognized, "We have not limited this principle [that some facially neutral employment practices are unlawful even in the absence of discriminatory intent] to cases in which the challenged practice served to perpetuate the effects of pre-Act intentional

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[27] J. Levin and W.C. Levin, AGEISM: PREJUDICE AND DISCRIMINATION AGAINST THE ELDERLY 70-96 (1980).

[28] *See, e.g.*, Marc Bendick, Jr., Lauren E. Brown, & Kennington Wall, "No Foot in the Door: An Experimental Study of Employment Discrimination Against Older Workers," 10(4) JOURNAL OF AGING & SOCIAL POLICY 5 (1999); Marc Bendick, Jr., Charles W. Jackson, & J. Horacio Romero, "Employment Discrimination Against Older Workers: An Experimental Study of Hiring Practices," 8(4) JOURNAL OF AGING & SOCIAL POLICY 25 (1996); Benson Rosen & Thomas H. Jerdee, "The Nature of Job-Related Age Stereotypes," 59 JOURNAL OF APPLIED PSYCHOLOGY 511 (1976); Benson Rosen & Thomas H. Jerdee, "Influence of Age Stereotypes on Managerial Decisions," 61 JOURNAL OF APPLIED PSYCHOLOGY 428 (1976).

discrimination." *Watson*, 487 U.S. at 988. *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 339-40 (1977) (height and weight requirements had a disparate impact on women; a decision that had nothing to do with historical discrimination).

The Wirtz Report also refutes the argument that ageism lacks any history of entrenched bias. The Report documents a substantial record of "persistent and widespread" discrimination dating back at least to the beginning of the century. WIRTZ REPORT at 21. Indeed, it is a common misperception that discrimination against older persons, in contrast to discrimination based on race or gender, is a distinctly modern phenomenon. In fact, historians have documented that ageism has existed under various guises throughout history.[29/] The "hostility to age" manifest in contemporary stereotypes of older workers became a pervasive aspect of American culture during the latter half of the nineteenth century.[30/] By the end of the nineteenth century, American "[m]en found it difficult to secure employment at ages as low as 35 or 40; for women it was even younger." Kerry Segrave, AGE DISCRIMINATION BY EMPLOYERS 7 (2001). Job advertisements from the 1890's on frequently requested only "young" applicants. *Id.* at 6.

The perpetuation rationale also fails to account for the fact that Title VII addresses characteristics in such a way as to cover all workers, including whites, males, and other groups that have not been victimized by entrenched, historic patterns of invidious discrimination. Moreover, whether or not stereotypes are rooted in history is irrelevant to the debilitating effect those stereotypes have on older persons.

[29/] 4 OLD AGE IN A BUREAUCRATIC SOCIETY: THE ELDERLY, THE EXPERTS, AND THE STATE IN AMERICAN HISTORY: CONTRIBUTIONS TO THE STUDY OF AGING, ix (David Van Tassel & Peter N. Stearns, eds., 1986).

[30/] Brian Gatton, *The New History of the Aged*, in 4 OLD AGE IN A BUREAUCRATIC SOCIETY: THE ELDERLY, THE EXPERTS, AND THE STATE IN AMERICAN HISTORY: CONTRIBUTIONS TO THE STUDY OF AGING, 9 (David Van Tassel & Peter N. Stearns, eds., 1986).

As time marches on, age discrimination remains a pervasive force in our society. The ADEA was enacted 37 years ago, yet, age discrimination continues to impede the achievement of equality in the work place.[31/] "Like racism and sexism, ageism remains recalcitrant, even if below the surface. But it can be – and has been – churned up from its latent position."[32/]

CONCLUSION

In *McKennon v. Nashville Banner Publishing Co.*, the Court declared that "Congress designed the remedial measures in [the ADEA and Title VII] to serve as a 'spur or catalyst' to cause employers 'to self-examine their employment practices and, to endeavor to eliminate, so far as possible, the last vestiges' of discrimination." 513 U.S. at 358 quoting *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975). Without the disparate impact theory to challenge subtle forms of age discrimination, employers will not be encouraged to examine policies which adversely affect older workers, but instead will continue to ignore them so that rather than being eliminated, the last vestiges of age discrimination will likely become entrenched "operat[ing] to 'freeze' the status quo of prior discriminatory employment practices." *Griggs*, 401 U.S. at 430.

For the foregoing reasons, *amici curiae* respectfully urge this Court to rule that the disparate impact theory of proof is essential to fulfilling the ADEA's broad remedial purpose of eliminating age discrimination from the work place.

[31/] According to a recent survey of executives conducted by ExecuNet, "82 percent of those surveyed said that age discrimination is a serious problem in today's employment market, up from 78 percent three years ago. Nearly two-thirds of those surveyed said they have encountered age discrimination in a job search, up from 58 percent in 2001." Robyn A. Friedman, "Job Cuts: Looking for a Career Edge, Many Men are Seeking to Look More Youthful Through Cosmetic Surgery," FORT LAUDERDALE SUN-SENTINEL, at 1E (March 21, 2004).

[32/] Robert N. Butler, "Dispelling Ageism: The Cross-Cutting Intervention," 503 THE ANNALS 138, 140 (1989).

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Respectfully submitted,

Laurie A. McCann*
Daniel B. Kohrman
AARP Foundation Litigation

Melvin Radowitz
AARP

601 E Street, NW
Washington, DC 20049
(202) 434-2060
Counsel for *Amici Curiae*
* Counsel of Record

APPENDIX

Founded in 1915, the American Association of University Professors (AAUP) is an organization of approximately 45,000 faculty members and research scholars in all academic disciplines. Among the AAUP's central functions is the development of policy standards covering academic freedom, tenure, institutional governance, freedom from discrimination, and other key issues in higher education. *See, e.g., On Discrimination* and *1940 Statement of Principles on Academic Freedom and Tenure,* AAUP Policy Documents & Reports (9th Ed., 2001). As this Court has recognized, AAUP's policies are widely respected and followed as models in American colleges and universities. *See, e.g., Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 579 n. 17 (1972); *Tilton v. Richardson,* 403 U.S. 672, 681-82 (1971). AAUP and its members are deeply concerned that the unavailability of the disparate impact method of proof under the Age Discrimination in Employment Act (ADEA) would undermine the ability of professors to ensure freedom from age discrimination in the academic workplace.

The Asian American Legal Defense and Education Fund (AALDEF), founded in 1974, is a non-profit organization based in New York City. AALDEF defends the civil rights of Asian Americans nationwide through litigation, legal advocacy and dissemination of public information. AALDEF has represented and assisted many Asian Americans on employment and discrimination matters. Disparate impact analysis should apply equally to all groups claiming discrimination whether under Title VII or under ADEA.

The American Jewish Congress is an organization of American Jews that seeks to protect fundamental constitutional freedoms, particularly the civil rights and liberties of American Jews and all Americans. Since Jews in America are an aging population, the American Jewish Congress is particularly concerned with issues that affect the welfare of older Americans. In this connection it has called attention to such problems as nursing home abuses, problems with Medicare, and issues involving the effectiveness of various state agencies

administering laws banning age discrimination; and has filed briefs in this Court in such cases as *Cruzan v. Director, Missouri Department of Health.*

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. MALDEF has litigated numerous cases under Title VII since the organization's founding. Preserving the right of Latinos to be free of discrimination, on whatever basis, in all aspects of employment is a primary goal of MALDEF's Employment program.

Amicus Curiae Mississippi Center for Justice (MCJ) is a non-profit public interest law firm headquartered in Jackson, Mississippi. Incorporated as a Mississippi non-profit corporation in 2002, MCJ supports the rights of older Mississippians, as well as all Mississippians, to be free from employment discrimination and puts legal advocacy in service to anti-discrimination activists who promote those laws. MCJ's legal work builds on Mississippi's rich history of activism to correct social injustices and protects the civil rights of Mississippians through full enforcement of their federal and state constitutional and statutory rights.

The National Association for the Advancement of Colored People (NAACP), established in 1909, is the nation's oldest civil rights organization. It has state and local affiliates throughout the nation. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of minority groups; the elimination of racial prejudice; the publicizing of adverse effects of racial discrimination; and the initiation of lawful action to secure the elimination of racial bias. The NAACP has appeared as both plaintiff and *amicus curiae* before this Court and other courts throughout the nation in numerous civil rights cases.

The National Council of La Raza (NCLR) is the largest national Latino civil rights organization, which is an "umbrella organization" for more than 270 local affiliated community-

based organizations (CBOs) and about 33,000 individual associate members. In addition to providing capacity-building assistance to our affiliates and essential information to our individual associates, NCLR serves as a voice for all Hispanic subgroups in all regions of the country. As a civil rights organization, NCLR is vitally concerned with the maintenance of a strong, vigorous, and active federal civil rights enforcement system. NCLR believes that the proper use of the disparate impact standards is essential to protecting Hispanics, older workers, and other groups covered by Title VII of the Civil Rights Act and other laws prohibiting employment discrimination, from bias in the workplace.

The National Partnership for Women & Families, a non-profit, national advocacy organization founded in 1971 as the Women's Legal Defense Fund, promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of women and minorities in employment.

The NSCLC, the National Senior Citizens Law Center, is a non-profit public interest law firm which for more than 30 years has focused upon legal issues affecting low income elderly persons. This includes work in the areas of health and income support as well as age discrimination. NSCLC has long recognized the devastating impact that discrimination can have upon older workers. This is so regardless of the underlying motivation of the discriminating conduct. NSCLC has consistently addressed age discrimination issues in its work, and has represented clients in litigation with age discrimination claims based upon claims of practices having a disparate impact.

The National Women's Law Center ("NWLC") is a nonprofit, legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure

equal opportunity for women in the workplace, including through the full enforcement of Title VII of the Civil Rights Act of 1964 as amended. NWLC has participated as *amicus curiae* in numerous cases involving employment law and civil rights issues.